

KYML. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5792
Fax (313) 224-8224
e-mail: tbaughma@co.wayne.mi.us.

From the Desk of
TIMOTHY A. BAUGHMAN
CHIEF, RESEARCH, TRAINING AND APPEALS

April 18, 2008

Corbin Davis
Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: file 2007-38

Dear Mr Davis:

I am writing in opposition to the proposed change to MCR 6.201. The proposal would remove the “Upon request” language from the provision that the prosecuting attorney provide to the defense “any exculpatory information or evidence known to the prosecuting attorney.” Though this change seems innocuous, it is not; further, it does not belong in the Rules of Criminal Procedure.

When the revised rules of criminal procedure were first proposed by a committee appointed by this court, the discovery rules contained no provision regarding exculpatory material. And at that time this court adopted no rule at all. Not until 1989 did this court adopt a rule concerning discovery, containing the current provision regarding exculpatory information. But the prosecutor’s obligations under *Brady* are constitutional in nature (and there is also an ethical rule). Rules of procedure are not, in my view, designed to capture as a general matter principles of constitutional criminal procedure or ethical rules; these are left to case decisions (which may be modified) and the ethical rules. There are a very large number of constitutional “rules of criminal procedure” not contained in the court rules.

I would note, by way of example, and it does not stand alone, that FRCP 16 concerning discovery in criminal cases in the federal system makes no reference at all to disclosure of exculpatory evidence. This makes sense, for to embody constitutional principles in rules of procedure may fix a meaning in rule that may be refined, as a matter of case development, in subsequent litigation.

The proposal presently before the court is to remove the “upon request,” language from the rule so as to make the duty to provide “any exculpatory information or evidence known to the prosecuting attorney” a self-executing requirement. The staff comment states:

This proposal also clarifies that the prosecuting attorney is required to provide such information or evidence regardless of whether it is requested by the defendant. The Court would appreciate specific comments on whether a court rule requiring the prosecuting attorney to provide the defendant with exculpatory information or evidence is necessary, in light of the prosecuting attorney’s constitutional obligation to do so under *Brady v Maryland*, 373 US 83 (1963), and, if so, whether the proposed amendment of MCR 6.201(B)(1) is consistent with the requirements of *Brady*.

But the proposal is not a “clarification,” for “exculpatory evidence or information” and “Brady material” are *not* synonyms. *Brady* requires the disclosure without request of *materially* exculpatory evidence *that is not otherwise reasonably available to the defendant by alternative means*. To establish a due process violation it must be shown that:

- (1) The State possessed evidence favorable to the defendant,
- (2) That the defendant did not possess the evidence nor could the defense have obtained it with reasonable diligence,
- (3) That the prosecution did not disclose the evidence, and
- (4) That disclosure would have led to a reasonable probability of an acquittal, meaning confidence in the outcome is undermined.

See e.g. *People v. Fox*, 232 Mich. App. 541, 591 N.W.2d 384 (1998); *U.S. v. Jones*, 160 F.3d 473 (8th Cir. 1998). See also *United States v. Perez*, 473 F.3d 1147 (CA11, 2006).

These limitations on the *constitutional* duty of the prosecutor do not appear in the *current* rule, nor in the proposed amendment. And the constitutional principles involved should not be placed into the rule as the area should be left to the case law; further, the matter is covered in the Rules of Professional Responsibility in Rule 3.8(d). I would note that there are disclosure rules as a matter of ethics concerning defense counsel, who must disclose, and without request, physical evidence of the crime coming into his or her possession, see *People v Nash*, 418 Mich 196 (1983), and that this duty is not covered in MCR 6.201. This is not to say it *should* be covered—it should not be—in the court rules, but neither should the principles of *Brady*, which should be left to case law and the ethics rules.

I would therefore recommend that the provision in question not be modified in the manner proposed, but *eliminated entirely*. In the alternative, if the proposal is to be adopted, then the phrase “exculpatory information” should be deleted and replaced with the actual legal “term of art,” *Brady* evidence.”

For these reasons, the proposed rule change should not be adopted, at least in its current form. These views are my own and not intended as an expression of those of my Office.

Sincerely,

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals